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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 653

GLOBE SLICING MACHINE CO., INC.
and LEWIS NOVOTING,

Petitioners,

against

ROLF K. HASNER,

Respondent,

and

ASTRID SIVERTSEN,

Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TO THE HONORABLE THE CHIEF JUDGE AND THE ASSOCIATE JUDGES OF THE UNITED STATES SUPREME COURT:

Petitioners pray for a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above case, on the 15th day of June, 1964.

Opinions Below

The opinion of the District Court for the Southern District of of New York (Appendix, pp. 11-21), is reported at 223 F. Supp. 589.

The opinion of the Court of Appeals for the Second Circuit, is reported at 333 F. 2d 413 (Appendix, pp. 22-27).

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was made and entered on 15th day of June 1964.

The order denying petition for a re-hearing was made and entered on August 10, 1964. Copies thereof are appended to this petition in the appendix, at pages .

The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

Questions Presented

Jurisdiction is based on diverse citizenship in this action for injunction to prevent defendants from exercising any right in shares of stock and for specific performance compelling one of the defendants to offer the shares for purchase, wherein defendants counterclaimed seeking a declaration of their rights to stock, and a declaration that alleged restraints on sale or disposition of the stock were inapplicable, the District Court, Thomas F. Murphy, J., held that the defendants are entitled to a judgment dismissing the complaint and declaring, among other things, that the certificate of amendment of the certificate of incorporation of the corporate petitioner filed with the Secretary of State, on January 10, 1963, is null and void. The Court of Appeals affirmed, but remanded the case for amplification of the order of the District Court and modification of its injunctive provisions, consistent with the opinion.

The questions presented are, as follows:

1. Whether summary judgment, declaring that the by-law of Globe, restricting sale or disposition of shares by

a stockholder is not applicable to transfers consequent on the death of a stockholder and effected pursuant to the stockholder's will, was proper and correct?

2. Whether the injunctive provision of the judgment barring the petitioners from taking any action, or exercising any rights under the New York Business Corporation Law deprives them of due process and the equal protection of the law?

Constitutional Provisions and Statutes Involved

U.S.C.A. Constitution Amend. Article 14, Section 1.

N. Y. Constitution Article 1, Section 11.

Business Corporations Law, Sections 504(c), (d), (e); 505(a); 803(a); 1102 and 1104(1), (2), (3), (c).

Fed. R. Civ. P. 56(c).

Statement of the Case

A

Prior Proceedings

The individual petitioner Lewis Novoting (hereinafter "Novoting") is, and for over 30 years has been, one of the two major stockholders of a closely held corporation, appellant Globe Slicing Machine Co., Inc. (hereinafter "Globe"). This action arises as a result of the death of the other major stockholder, Peter M. Sivertsen, who owned 54 per cent of Globe's Class A common stock (hereinafter "Class A" stock). The Class A common stock has the exclusive right to elect directors. Novoting owns the balance of the Class A shares as well as a majority of the Class B common stock (hereinafter "Class B" stock),

which confers the right to vote on all other matters.

The nub of the controversy is that Sivertsen's executor, defendant-appellee Rolf K. Hasner (hereinafter "Hasner"), claims the right to transfer Sivertsen's Class A shares to Sivertsen's widow despite a provision in Globe's by-laws, adopted in 1930, prohibiting stockholders from selling or disposing of their shares without first offering the corporation or its other stockholders an opportunity to purchase such shares.

On cross-motions for summary judgment under Rule 56, the Court below (Murphy, J.) ruled as a matter of law that this unqualified restriction on sale or disposition of stock did not apply to dispositions by will but only to *inter vivos* transfers. Further, the Court placed Novoting under a sweeping injunction against interfering with Hasner's rights as declared.

As a result of this judgment, Sivertsen's executor and his widow have gained the right to control the affairs of Globe. This result obtains although Sivertsen was a business associate of Novoting's own choosing and Sivertsen's widow and executor are not. Without having had the opportunity to present evidence at a trial as to the intent and purpose of the by-laws, Novoting has been placed completely at the mercy of these persons whom he never agreed to accept as his partners—let alone as his superiors. Thus, the very situation which Globe's stockholders sought to protect themselves against by enacting a by-law against dispositions of stock has come to pass.

After the District Court rendered its decision and before the entry of judgment, Globe transferred 50 shares of Class A stock from its treasury to Novoting for $40,000 and his promise to pay such additional sum as was fixed by the Board of Directors as fair value. On settlement of the judgment, Hasner claimed that these shares were void because they were issued without the authority of the Board of Directors (197). In their memorandum objecting to Has-

ner's proposed judgment, Globe and Novoting denied that the shares were invalid, and stated that the transfer of the additional shares to Novoting was fully authorized by the New York Business Corporation Law (204-05).

The Court District, without holding a further hearing, included in its judgment the following injunction (207):

> "Plaintiffs, their officers, agents, servants, employees, attorneys, and all persons in active concert or participation with them are permanently and perpetually enjoined and restrained from taking any action, including making any application in any other court than this Court, to interfere with the exercise by defendant Hasner of his rights, as such rights are herein declared, including the voting of any shares which, without authorization of the Board of Directors, have been issued by, or transferred from the treasury of, Globe Slicing Machine Co., Inc. since the commencement of this action."

The District Court ruled in Hasner's favor on all issues raised by the summary judgment motion. Judge Murphy stated that New York law governed, and held that Article IX applied only to inter vivos transfers since it did not explicitly refer to transfers upon death (185-86).

The District Court further ruled that the 1963 amendment to the certificate of incorporation effectuating the 1930 by-law provision for a 76 per cent super-majority was invalid, since the by-law contravened public policy when adopted, and was not followed in practice (191).

B

Pleadings

This action was commenced on February 11, 1963 by Novoting and Globe against defendant-appellee Hasner, ex-

ecutor of the estate of Peter M. Sivertsen, and Astrid Sivertsen, the widow and legatee of Peter M. Sivertsen. Defendant Astrid Sivertsen was not served, and the action has been dismissed as against her (12, 83).* Jurisdiction is based on diversity of citizenship.

The complaint alleges that Peter M. Sivertsen and Lewis Novoting were the owners of the Class A stock of Globe (21), and that in 1930, Globe enacted a by-law (quoted fully at pp. 8, 9, *infra*) providing that "no sale or disposition" of the shares of the corporation was valid unless the stockholder first gave the corporation or its other stockholders the option of purchasing his stock at a price to be determined by the formula set forth in the by-laws (18-21). The complaint alleges that in violation of this by-law, Peter M. Sivertsen, who died on October 28, 1962, bequeathed his stock by will to Astrid Sivertsen (21-22). The complaint seeks a judgment of specific performance, compelling Hasner and Astrid Sivertsen to offer these shares to plaintiffs for purchase pursuant to the by-laws, and an injunction restraining defendants from exercising any rights in these shares (25-26).

The answer and counterclaim of defendant Hasner asserts that this restrictive provision in the by-laws applies only to *inter vivos* transfers, and thus does not prevent Peter M. Sivertsen's shares from passing in the first instance to Hasner as his executor, and, eventually, to Astrid Sivertsen as his legatee (36). In addition, Hasner sought, among other things, a judgment declaring null and void an amendment to Globe's charter embodying a provision in the 1930 by-laws which required a 76 per cent vote of stockholders on matters submitted to them, and an injunction against any interference with his rights (37).

Plaintiffs filed a reply denying the invalidity of the by-laws and charter amendment requiring the 76 per cent

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* Numbers in parentheses refer to pages of the joint appendix.

super-majority (47). By order, dated April 24, 1963, the District Court (Sugarman, J.) granted cross-motions for temporary injunctions for the preservation of the status quo.

C

Facts

Globe was organized under the laws of the State of New York in 1925 by a small group of businessmen, including Novoting and Peter M. Sivertsen.

In early 1930, Globe raised capital by selling Class A and Class B stock to William Schmitz and George Schaab (129). As a result of these sales, the Class A and Class B stock of Globe, on January 25, 1930, was held as follows (85, 130-31):

Name	Class A	Class B
William Schmitz	65	64½
George Schaab	65	64½
Peter M. Sivertsen	136	97
Lewis Novoting	107	127
William Lorenz	107	127
Adolf Peters	38	37
	518	517

Simultaneous with the sale of stock to these outsiders, Globe, at a special meeting of stockholders on January 25, 1930, adopted the by-law in question on this appeal (50, 61-64).

Article IX of the by-laws, adopted at the January 25, 1930 meeting, provides (62-64):

"Sale or Disposition of Stock.

"Sec. 1. Restrictions and Conditions Precedent to Sale or Disposition by Stockholders of Shares

> OF CAPITAL STOCK OF THIS COMPANY. No sale or disposition of any shares of the capital stock of this corporation by any stockholder shall be valid unless and until he shall give notice in writing of such intention to the corporation, and to all the present stockholders of the company (except Mr. Frederick Singer,) whereupon the company and all of said stockholders shall jointly and/or severally have the option and right to purchase the same within thirty days after receiving such notice, for the higher price of either of the following: • • •

It is significant that, although the statement of undisputed facts (85) states that on January 25, 1930, William Schmitz and George Schaab each purchased sixty-five (65) shares of the Class A common stock of Globe, and sixty-four and one-half (64½) shares of the Class B common stock of Globe, the attention of the District Court was not directed to the record on appeal in a case entitled, *William Lorenz* v. *Kurt Engelsted and Globe Slicing Machine Co., Inc.*, 251 App. Div. 821, where a stockholder's agreement, entered into when William Schmitz and George Schaab purchased the Globe stock, was marked in evidence as plaintiffs' Exhibit 6, and appears on page 248 of the said record. (Parenthetically Globe Slicing Machine Co., Inc. was represented by the present counsel for the appellee in that case.)

Art. IX is not to be read in isolation, but as part of the stockholders' agreement in 1930, which resulted in the amendment of Globe's by-laws. The action of Globe's stockholders in amending the by-laws (98, 99), after the execution of the stockholders' agreement, is a relevant guide to the scope and meaning of the by-law in question. Judge Murphy's decision that the executor of the Estate of Peter M. Sivertsen is not obligated to give first refusal to the petitioners is premised on the failure of Art. IX to specifically provide, as in *Allen* v. *Biltmore Tissue Co.*,

2 N. Y. 2d 534, that on the death of the decedent, the corporation and the surviving stockholder shall purchase and the estate of the decedent shall sell to them, the decedents' stock on the terms and conditions set forth. Although this litigation does not involve the validity and interpretation of a stockholders' agreement, which was intended to assure surviving stockholders in Globe, a closely held corporation, the right to purchase the stock of a deceased stockholder, on terms and conditions set forth in the restrictive agreement, it is an invaluable aid to the interpretation of the by-law in question, as well as in determining the intent of the parties. Acting under this agreement, a special stockholders' meeting was held (99). The decedent was a signer of the agreement and one of the architects of the method of evaluating the stock here involved. The stockholders in a closely held corporation bear a personal relationship to one another similar to that of a partnership and, as a consequence, the shares in such corporations signify more than a mere property interest. The restrictive stock agreement is one of the devices evolved for insuring the succession in interest of persons most likely to act harmoniously with the other shareholders.

The stockholders' agreement (85, 130, 131) and the amendment of the by-laws (99) were parts of one course of action.

The agreement establishes the intent of the parties in making paragraph 10 of the stockholders' agreement Art. IX of the by-laws, and so far as relevant here, reads as follows:

> "10th. That during the term of this agreement, no sale or disposition of any shares of the capital stock of the Company by any stockholder shall be valid, unless and until he shall give notice in writing of such intention to the Company and all the said parties hereto, shall jointly and/or severally have the

option and right to purchase the same within thirty days after receiving such notice, for the higher prices of either of the following:

* * * * * *

11th. That immediately after the execution of this agreement, the certificate of incorporation and by-laws of the Company, and the by-laws of the Whitlock Holding Corporation, shall be amended so as to give full force and effect to all the terms, covenants and conditions contained in this agreement, in such form and manner as may be advised by Harry G. Guttman, Esq., particularly with respect to the following:

* * * * * *

D: The foregoing provisions relative to the sale or disposition of the shares of capital stock of the Company shall be set forth in the by-laws of the Company.

E: Each and every stock certificate of the Company shall have printed, typewritten, or written thereon a notice that the same may be sold only subject to the terms of this agreement and subject to the provisions of the by-laws of the Company relative thereto.

* * * * * *

14th. In the event of the death of William Schmitz, Mr. George Schaab shall become and shall be elected as the Vice-President of the Company and of the Whitlock Holding Corporation, in the place and stead of said William Schmitz, with the same rights and powers herein granted to said William Schmitz.

15th. *In the event of death of any director or voting trustee, his executor, and in the event of a sale by any director of all his shares of the capital stock of the Company, his assigns, shall designate the person to act in his place and stead as said director and trustee, and the directors shall elect such person as such director.* (Emphasis supplied)

17th. *All the terms, covenants and conditions contained in this agreement shall be binding upon and shall inure to the benefits of all of the parties hereto, and their respective heirs, executors, administrators, successors, assigns and representatives.* (Emphasis supplied)

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year first above written.

PETER M. SIVERTSEN
LOUIS NOVOTING
WILLIAM LORENZ
ADOLF M. PETERS
GEORGE SCHAAB
WILLIAM SCHMITZ"

The attention of the Court is directed to the fact that paragraph 17 of the agreement hereinabove set forth, binds the respective estates of the parties. Paragraph 15 of the agreement indicates clearly what was to occur in the event of death. The agreement contemplated a personal arrangement between the stockholders (85) with respect to the management of the affairs of the corporation, the employment of each, their election as directors, and the option to purchase back from each other. When the by-laws were amended, so as to incorporate paragraph 10 of the agreement into the by-laws, the law of the corporation was that in the event of the death of any one or more of the parties the remaining stockholders should have the option to purchase and acquire the stock of the deceased party on certain terms and conditions.

As of the time of Peter M. Sivertsen's death, no stockholder had exercised his right to withdraw from this agreement.

At the same January, 1930 meeting, the stockholders adopted a by-law requiring the presence of stockholders

representing 76 per cent of the capital stock for a quorum at stockholders' meetings, and a vote of stockholders representing 76 per cent of the capital stock to authorize any action (52, 55-56).

Between 1930 and 1942, the stock of Peters, Lorenz, Schmitz and Schaab was retired. Sivertsen and Novoting became the only holders of Class A stock of the corporation, and their wives the only holders of Class B stock. At the time of Sivertsen's death in 1962. the stock of the company was held as follows (4, 21):

Name	Class A	Class B
Peter M. Sivertsen	136	
Astrid Sivertsen		97
Lewis Novoting	107	127*
	243	224

Thus, Novoting, while owning only 46 per cent of the Class A stock, controlled over 50 per cent of the combined classes of stock.

From the beginning, Sivertsen and Novoting shared the management of Globe. Sivertsen was president of Globe; Novoting was secretary and treasurer (84). There is no evidence that their relationship was anything but harmonious.

On October 28, 1962, Peter M. Sivertsen died. He executed a will on July 19, 1962, appointing Hasner, a citizen of Norway, as his executor, and bequeathed all of his stock to his wife, Astrid Sivertsen (84).

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* Class B stock held by Lewis Novoting as executor of estate of Josephine Novoting.

In January, 1963, Novoting and Globe, in accordance with Article IX, expressed their desire to purchase the Class A stock owned by Sivertsen at the time of his death (7, 68-69). At or about the same time, Globe filed an amendment to its certificate of incorporation embodying the by-law requiring a 76 per cent vote on matters coming before the stockholders' meeting.

Reasons for Granting the Writ

1. The decision below went on summary judgment. There was no trial to consider the background of facts and circumstances existing when Article IX of the by-laws was enacted. The intention of the stockholders is to be ascertained not by what actually occurred long after the enactment of Article IX of the by-laws, but by what was apparently or presumably in the contemplation of the stockholders at the time they enacted Article IX. It is impossible for a court to determine the meaning with which the words were employed, without considering all of the facts and circumstances. The trier of facts must find not only what the parties intended, but also as part of the same process whether the acts thereafter were within the intent of the parties.

2. Summary judgment procedure is to be used with particular care where motives and intentions are to be taken into consideration. This court should correct the situation when that procedure has been misused. (*White Motors Company* v. *United States*, 372 U. S. 253.)

3. Restrictions on the transfer of corporate stock have become almost an indispenable feature of the closed corporation, but the problem of their validity has by no means been wholly resolved. A restriction on transfer may take the form of an absolute prohibition of transfer, a prohibition of transfer to designated individuals or mem-

bers of a class, or a condition that no transfer will be effective unless the stockholder first offers the stock to the corporation or its stockholders. The number of possible variations and combinations of restrictions is virtually without limit.

The reasons why corporations or stockholders impose restrictions upon the transfer of shares are nearly as diverse as the forms the restrictions may take. Most frequent, perhaps, is the wish to confine ownership and management to a relatively few persons, who may be related to one another and familiar with and friendly to the corporation's policies and purposes. Some types of restrictions may reflect a desire to perpetuate various advantages of operating a business as a partnership and yet benefit from the protections afforded by doing business in the corporate form. Other restrictions may be designed primarily to prevent shares from falling into the hands of competitors, or from descending to next-of-kin or legatees unsympathetic to present management.

The law on the validity and effect of stock transfer restrictions has developed, at least in this country, in a confused and piecemeal fashion. For the most part, it is case law. The decisions are largely based upon supposed "public law".[1]

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[1] Among useful discussions of problems in this area are the following: Ballantine, Corporations §§ 336-38 (Rev. Ed. 1946); 12 Fletcher Cyclopedia of Private Corporations §§ 5452-58 (Rev. Vol. 1957); 2 O'Neal, Close Corporations: Law and Practice §§ 7.01-29 (1958); Stevens, Corporations § 129 (2nd Ed. 1949); Cataldo, Stock Transfer Restrictions and the Closed Corporation, 37 Va. L. Rev. 729 (1951); Hayes, Corporation Cake with Partnership Frosting, 40 Iowa L. Rev. 157 (1954); Hornstein, Judicial Tolerance of the Incorporated Partnership, 18 Law & Contemp. Prob. 435 (1953); O'Neal, Restrictions on Transfer of Stock in Closely Held Corporations: Planning and Drafting, 65 Harv. L. Rev. 773 (1952).

4. The decision of Judge Murphy involves a direct conflict with the decision of the District Court rendered by Judge Dooling (in *Mathews* v. *United States*, E.D.N.Y., 226 F. Supp. 1003, 1006), in which he held that a restriction contained in a stockholders' agreement on sale or disposition of shares by a stockholder is applicable to transfers consequent on death. More basically, such an important and far reaching question should be decided only by this Court after full hearing.

5. Furthermore, the injunctive provision barring the appellants from taking any action, "including making any application in any other court than this court, to interfere with the exercise by defendant, Hasner of his rights as such rights are herein declared, including the voting of any shares which, without authorization of the board of directors, have been issued by, or transferred from the treasury of Globe Slicing Machine Co., Inc., since the commencement of this action", violates their constitutional rights under the Federal and State Constitution. (*Town of Hempstead* v. *Goldblatt*, 366 U. S. 942; *Duplex Printing Co.* v. *Deering*, 254 U. S. 443, 465; *Truax* v. *Corrigan*, 257 U. S. 312; *Morgan* v. *United States*, 304 U. S. 1.)

6. This court has held on numerous occasions, that a party, by moving for summary judgment in his favor, is not precluded on appeal from asserting there were issues of fact barring summary judgment against him.

7. Settlement of the question that the by-law restriction on sale or disposition of shares by a stockholder is not applicable to transfers consequent on death, is plainly in the public interest.

8. The question also involves the rights of the Internal Revenue Service in the collection of inheritance taxes, as is

illustrated in *Mathews* v. *United States,* 226 F. Supp. 1003, in which Judge Dooling said:

> "[4] Do the Agreements, here, mean that 'transfer' by will gives the other stockholders the right to call for the stock at book value? And, if not, what, if any, effect have the Agreements on the stock bequeathed by decedent? Storer v. Ripley, N. Y. Co. 1958, 12 Misc. 2d 662, 178 N.Y.S. 2d 7 and Lane v. Albertson, 2d Dept. 1903, 78 App. Div. 607, 79 N. Y. S. 947 emphasize that, in the absence of an explicit provision giving the other stockholders a right to call for the stock of a decedent upon and by reason of his death (See Seruggs v. Cotterill, 1st Dept. 1902, 67 App. Div. 583, 73 N.Y.S. 882), the courts of New York are slow to read the word 'transfer' broadly in a first refusal agreement and are slow to treat transmission by will as requiring a sale to the other stockholders. Neither case states that the stock in the hands of the legatee, is discharged of the restriction in the event the legatee seeks to make a sale. Plainly, in Lane v. Albertson the stock would continue subject to the bylaw. Cf. Estate Funds, Inc. v. Burton-Fifth Avenue Corp., Sup. N. Y. Co. 1952, 111 N.Y.S. 2d 596, 598. The Storer case implies a view that the restriction was to last only during Ripley's life because the arrangement contemplated, in addition to the cross-options, that Ripley would be a director, employee and indispensable to a quorum of directors. While the factors mentioned would appear to induce the conclusion that, since the relation was so intimate, death would be a proper occasion for the survivor to claim the stock and choose a new partner with whom so intimate a relation could be tolerable (Cf. Holmes, C. J., in Barrett v. King, 1902, 181 Mass. 476, 479, 63 N. E. 934, 935), the Court was impressed that the decedent would not have meant to provide for the ouster of his own widow and sons from his own corporation and intimated, gratuitously, that they also

took free of the first refusal. Cf. Stern v. Stern, 1945, 79 U. S. App. D. C. 340, 146 F. 2d 870 (no indication stock 'free' in hands of legatee); In the Matter of Trilling & Montague, Inc., E. D. Pa. 1956, 140 F. Supp. 260 (transfer by bankrupt's trustee not within stockholder agreement where the Stockholders could bid at trustee's sale). Contrast Boston Safe Deposit & Trust Co. v. North Attleborough Chapter, 1953, 330 Mass. 114, 111 N. E. 2d 447.

The question is one of interpretation and not of the existence of a rule of law that requires a conclusion that if the words 'executors and assigns,' or equal, are not used, the contract rights and duties do not survive any party's death. In the present case the Agreements say nothing about personal representatives or distributees or assignees of stock. If narrowly read, the Agreements would literally forbid only the parties themselves from making transfers outside the family circle and would not forbid a transfer by a lineal descendant to whom a party permissibly transferred stock or by any other permitted transferee. Cf. Peets v. Manhasset Civil Engineers, Inc., Nassau Co. 1946, 4 Misc. 2d 683, 689, 68 N.Y.S. 2d 338, 345. Specifically, the bequest to the window and son in the present case, if considered a permitted transmission, would take the stock quite outside the Agreements.

So literal a reading does not express the manifest sense and purpose of the Agreements. The purpose is to keep family ownership intact. Cf. Serota v. Serota, Queens Co. 1938, 168 Misc. 27, 29, 5 N.Y.S. 2d 68 * * *."

CONCLUSION

For the foregoing reasons, appellants respectfully pray that this petition for a writ of certiorari be granted, that this Court enter an order noting probable jurisdiction, and that the case be briefed and argued orally on the merits.

Respectfully submitted,

HAROLD W. TEPFER,
Attorney for Petitioners.

BENNETT E. ARON.
Of Counsel.

APPENDIX

Judgment.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifteenth day of June, one thousand nine hundred and sixty-four.

Present: HON. J. EDWARD LUMBARD,
Chief Judge,
HON. LEONARD P. MOORE,
HON. J. JOSEPH SMITH,
Circuit Judges.

GLOBE SLICING MACHINE CO., INC., and
LEWIS NOVOTING,

Plaintiffs-Appellants,

v.

ROLF K. HASNER,

Defendant-Appellee.

Appeal from the United District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Judgment.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Further ordered, adjudged and decreed that the action be and it hereby is remanded for amplification of the court's order and modification of its injunctive provisions in accordance with the opinion of this court.

A. DANIEL FUSARO,
Clerk.

Order Denying Petition for Rehearing.

UNITED STATES COURT OF APPEALS,

SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals in and for the Second Circuit, held at the United States Court House, in the City of New York, on the seventh day of August, one thousand nine hundred and sixty-four.

Present: HON. J. EDWARD LUMBARD,
Chief Judge,
HON. LEONARD P. MOORE,
HON. J. JOSEPH SMITH,
Circuit Judges.

GLOBE SLICING MACHINE CO., INC., and
LEWIS NOVOTING,

Plaintiffs-Appellants,

v.

ROLF K. HASNER,

Defendant-Appellee.

A petition for a rehearing having been filed herein by counsel for the appellants,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO,
Clerk.

Opinion of Murphy, D. J.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

APPEARANCES:

Anthony F. Avallone, Esq.,
Attorney for Plaintiffs.
Simpson Thacher & Bartlett, Esqs.,
Attorneys for Defendants,
(Richard Hawkins, Esq.,
(Rogers M. Doering, Esq., of Counsel.

MURPHY, D. J.

These are cross-motions for summary judgment. Jurisdiction is based on diverse citizenship and New York law is applicable.

The principal contested legal issue is whether the bylaws of the Globe Slicing Machine Company prohibiting the "sale or disposition" of shares of its capital stock without first giving the corporation or its other stockholders an opportunity to purchase are applicable to transfers consequent upon the death of a shareholder. On this issue the parties agree that there is no question of fact.

Globe was incorporated in New York in 1925. Its principal officers were Peter M. Sivertsen, president, who died in 1962, and Lewis Novoting, secretary and treasurer, and one of the plaintiffs. Sivertsen at the time of his death owned 136 shares of Class A stock (the only class entitled to vote) and Novoting 107 shares of the same class, the

total of both, 243 shares, are all the outstanding shares of Class A. By will admitted to probate in Connecticut, Sivertsen bequeathed his 136 shares to his wife, the defendant Astrid Sivertsen, and named Rolf K. Hasner, the other defendant, as executor. Hasner has qualified as such and has demanded registration of the 136 shares in his name as executor of the estate of Sivertsen, deceased, and intends to vote the shares at the next stockholders' meeting.

Plaintiffs have offered to buy the 136 shares at a formula price set forth in the bylaws but Hasner has refused to offer the shares to them. Plaintiffs seek an injunction to prevent Hasner from exercising any rights in the shares and for specific performance compelling him to offer the shares for purchase pursuant to the bylaws.

Defendants have counterclaimed seeking a declaration of their rights to the stock and a declaration that the alleged restraints on the sale or disposition of the stock are inapplicable. Other issues and facts will be discussed after resolution of this principal issue.

The bylaws in question, passed in 1930, read as follows:

"Article IX

SALE OR DISPOSITION OF STOCK.

Sec. 1. RESTRICTIONS AND CONDITIONS PRECEDENT TO SALE OR DISPOSITION BY STOCKHOLDERS OF SHARES OF CAPITAL STOCK OF THIS COMPANY. No sale or disposition of any shares of the capital stock of this corporation by any stockholders shall be valid unless and until he shall give notice in writing of such intention to the corporation, and to all the present stockholders of the company (with the exception of Mr. Frederick Singer) whereupon the company and all of said stockholders shall jointly/[sic] and or severally have the option and right to purchase the same within thirty

days after receiving such notice, for the higher price of either of the following:

[The by-law here sets forth a formula for determining the price.]

Sec. 2. TERM OF RESTRICTION OF SALE OR DISPOSITION BY STOCKHOLDERS OF SHARES OF CAPITAL STOCK OF COMPANY. The foregoing restrictions shall continue until December 31st, 1937, and shall thereafter be automatically renewed from year to year. However, any of the present stockholders shall have the right to withdraw from this agreement after said December 31st, 1937, provided, that he shall give notice in writing by registered mail to each of said other present stockholders of his withdrawal from the terms of said restrictions, six months prior to December 31st, 1937, or six months prior to any aforementioned extension period."

We agree with defendants and hold that such bylaws are not applicable to transfers or disposition consequent on the death of a stockholder. Although no New York case that has been called to our attention is directly apposite it seems clear that although New York law will honor restrictive agreements on the alienating of property after death it must be "reasonable" and clearly expressed. Allen v. Biltmore Tissue Corp., 2 N. Y. 2d 534 (1957).

The bylaws here say not one word about conditions or restrictions in the event of death, nor is any reference made to heirs or assigns or legal representatives. If more were needed Sec. 2 of Article IX of the bylaws giving the stockholder the right to withdraw from such restrictive agreement upon giving six months notice is quite relevant; also Article V of the bylaws provides that transfers on the books of the corporation must be by the person named in the certificate or by his *legal representative.*

We are supported in our conclusion by three New York cases in which the restrictions on transfer, although more severe than the instant bylaws, were held not applicable after death. In Matter of Starbuck, 251 N. Y. 439 (1929), the court through Lehman, J., held that § 66 of the Stock Corporation Law which permitted a corporation to refuse to transfer shares of a stockholder who was indebted to the corporation until the indebtedness was paid, was not applicable to a transfer taking place automatically at the death of the stockholder and required the corporation to transfer the shares upon its books to the name of the stockholder's executrix.

In Lane v. Albertson, 78 App. Div. 607, 79 N.Y.S. 947 (2d Dept., 1903), a bylaw reading: "No member of the association, nor his executors, administrators, or other legal representatives, shall sell or transfer any of the capital stock of the association held by him or them, without first offering the same for sale to the association . . . ." did not apply either to the transfer of the shares from the decedent to his executor or to the transfer from the executor to the legatee.

In Storer v. Ripley, 12 Misc. 2d 662, 178 N.Y.S. 2d 7 (Sup. Ct., 1958) a bylaw providing: "The undersigned . . . agree that the stock interest of the parties hereto shall not be sold, signed [sic], transferred or hypothecated unless it is first offered to the other at the purchase price or book value whichever is the greater, payment to be made in 90 days." was held not to apply to transfers consequent after death of one of the stockholders. In commenting upon restrictions on alienability after death it said: "But there must be such an agreement and if it is to operate as such a restriction that consequence must be clearly expressed." 178 N. Y. S. at p. 10.

Plaintiffs misplace reliance on Allen v. Biltmore Tissue Corp., *supra,* because in *Allen* the bylaws specifically pro-

vided: "In case of the death of any stockholders, the corporation shall have the right to purchase the stock from the legal representative of the deceased." Globe's bylaws in question have no such restriction. Their further reliance on Boston Safe Deposit & Trust Co. v. North Attleborough Chapter of American Red Cross, 330 Mass. 114, 111 N. E. 2d 447 (1953) if contrary to New York is not controlling since Massachusetts law is not applicable under Erie R. R. v. Tompkins, 304 U. S. 64 (1938).

In view of our holding defendants' further argument the plaintiffs have in the past construed the bylaws as having no such restrictions, particularly with reference to the treatment of the deceased Mrs. Novoting's shares, need not be considered.

Accordingly, since defendant Hasner under New York and Connecticut law (Allen v. Biltmore Tissue Corp., *supra;* Lynch v. Skelly, 138 Conn. 376, 85 A. 2d 251 (1951) is vested as executor with the title to the personal property of the decedent, Sivertsen, and since the restrictions in the bylaws are not applicable he is entitled to a judgment (1) dismissing the complaint; (2) declaring that he as executor of Peter M. Sivertsen is the owner of and entitled to vote the 136 shares of the common stock of Globe, and (3) that the alleged restrictions on the sale or disposition of the shares of Globe are inapplicable to the transfer consequent upon the death of Peter M. Sivertsen.

Another issue in the case relates to the recent amendment of Globe's charter which defendants' counterclaim seeks to have declared null and void. Here, too, there is no issue of fact.

In January, 1963, a certificate of amendment to the certificate of incorporation of Globe was filed with the Secretary of State of New York. The complained of part reads:

> "3. The Certificate of Incorporation is hereby amended to add a provision pursuant to § 9 of the Stock Corpora-

tion Law rquiring greater than a majority or plurality vote of shareholders reading in full as follows:

'ELEVENTH: STOCKHOLDERS MEETINGS

(1) At all meetings of stockholders, except where it is otherwise provided by law, it shall be necessary that stockholders, representing in person or by proxy 76% of the capital stock shall be present to constitute a quorum.

(2) At all meetings of the stockholders, all questions, the manner of deciding which is not specifically regulated by statute, shall be determined by a 76% vote of the stockholders present in person or by proxy; provided, however, that any qualified voter may demand a stock vote in which case each stockholder present in person or by proxy shall be entitled to cast one vote for each share of stock owned or represented by him. All voting shall be vive voce, except that a stock vote shall be by ballot, each of which shall state the name of the stockholder voting and the number of shares owned by him and in addition if such a ballot be cast by proxy, the name of the proxy shall be stated. The casting of all votes at Special meetings of stockholders shall be governed by the provisions of the General Corporation Laws of this State.

(3) The by-laws of this corporation may be altered, amended, repealed or added to by an affirmative vote of the stockholders representing 76% of the capital stock at any annual meeting or at a special meeting called for that purpose, provided that a written notice shall have been sent to each stockholder of record at his last known post office address, at least ten (10) days before the date of such annual or special meeting, which notice shall

state the alterations, amendments or changes which are proposed to be made in such by-laws. Only such changes as have been specified in the notice shall be made. If, however, all the stockholders shall be present at any regular or special meeting, these by-laws may be amended by a unanimous vote without any previous notice.' "

The authority for such amendment to its charter is, as stated in the affidavit of plaintiff Novoting and a Mr. Carey, the record of the stockholders meeting of January 25, *1930*, at which the following resolutions were adopted:

"Upon motion duly made, seconded and unanimously carried, Sections 2 and 4 of Article I of the by-laws of the company were amended to read as follows:

Sec. 2. QUORUM. At all meetings of stockholders, except where it is otherwise provided by law, it shall be necessary that stockholders, representing in person or by proxy 76% of the capital stock, shall be present to constitute a quorum.

Sec. 4. VOTING. At all meetings of the stockholders all questions, the manner of deciding which is not specifically regulated by statute, shall be determined by a 76% vote of the stockholders present in person or by proxy; provided, however, that any qualified voter may demand a stock vote, in which case each stockholder present in person or by proxy, shall be entitled to cast one vote for each share of stock owned or represented by him. All voting shall be viva voce, except that a stock vote shall be by ballot, each of which shall state the name of the stockholder voting and the number of shares owned by him, and in addition, if such ballot be case [sic] by proxy, the name of the proxy shall be stated. The casting of all

votes at special meetings of stockholders shall be governed by the provisions of the General Corporation Laws of this State.

"Upon motion duly made, seconded and unanimously carried, Sections 1, 2, 8, 9, and 10 of Article II of the by-laws of the company were amended to read as follows:

Sec. 1. NUMBER. The affairs and business of this corporation shall be managed by a Board of Four Directors, who need not be stockholders of record, and at least one of such directors shall be a resident of the State of New York.

Sec. 2. How ELECTED. At the annual meeting of stockholders, the four persons receiving a plurality of the votes shall be directors and shall constitute the Board of Directors for the ensuing year * * *"

Putting aside temporarily defendants' objections that the 1930 resolutions were only amendments of the bylaws, and the objections that Globe failed to include in its amended certificate resolutions of the same date permitting directors to be elected by a plurality vote, it is clear that such resolutions were contrary to the law as it then existed and against the public policy of the State of New York because they violated § 55 of the Stock Corporation Law.

In Benintendi v. Kenton Hotel, Inc., 294 N. Y. 112 (1945) the court of appeals struck down a bylaw requiring a unanimous stock vote for the election of directors and characterized such bylaw as "intrinsically unlawful because it contravenes an essential part of the state policy, as expressed in the Stock Corporation Law * * *." Later, in Matter of Faehndrich, 2 N. Y. 2d 468 (1957), the same court held invalid a bylaw requiring a quorum of two-thirds of the shares at a special meeting of the stockholders.

The directors of Globe and its principal stockholders, as the minutes indicate, knew that such a bylaw was invalid having been so advised on a number of occasions, and they elected directors by a plurality and not by 76%.

Obviously what plaintiffs wanted to do in their attempt to amend the cerificate of incorporation was to take advantage of § 9 of the Stock Corporation Law as it was amended in 1948, now § 616 of the Business Corporation Law. That section provides:

> "§ 616. Greater requirement as to quorum and vote of shareholders.
>
> (a) The certificate of incorporation may contain provisions specifying either or both of the following:
>
> (1) That the proportion of shares, or the proportion of shares of any class or series thereof, the holders of which shall be present in person or by proxy at any meeting of shareholders in order to constitute a quorum for the transaction of any business or of any specified item of business, including amendments to the certificate of incorporation, shall be greater than the proportion prescribed by this chapter in the absence of such provision.
>
> (2) That the proportion of votes of the holders of shares, or of the holders of shares of any class or series thereof, that shall be necessary at any meeting of shareholders for the transaction of any business or of any specified item of business, including amendments of the certificate of incorporation, shall be greater than the proportion prescribed by this chapter in the absence of such provision.
>
> (b) An amendment of the certificate of incorporation which adds a provision permitted by this section or which changes or strikes out such a provision, shall be

> authorized at a meeting of shareholders by a vote of the holders of two-thirds of all outstanding shares entitled to vote thereon, or of such greater proportion of shares, or class or series of shares, as may be provided specifically in the certificate of incorporation for adding, changing or striking out a provision permitted by this section.
>
> (c) If the certificate of incorporation of any corporation contains a provision authorized by this section, the existence of such provision shall be noted conspicuously on the face or back of every certificate for shares issued by such corporation."

But even if the *1930* resolutions authorized an amendment of the certificate of incorporation (and we hold they do not) they could not be used as a basis for amending the charter 33 years later in 1963. Such resolutions were void and against public policy at the time they were adopted and continued so until some action by the stockholders adopted or ratified them according to former § 9 of the Stock Corporation Law now § 616 of the Business Corporation Law, after 1948. This was never done.

Holding as we do that the amendment of the certificate of incorporation was invalid and improperly filed, must the defendants bring an action against the Secretary of State to have it vacated or expunged or can they, as they suggest, validly counterclaim in this lawsuit seeking a declaration of its nullity? Since the Secretary of State acts only in a ministerial capacity in filing such certificate the remedy for a void certificate is the remedy defendants are pursuing. Cf. New York State Society of Professional Engineers v. Department of State, 174 Misc. 173, 20 N.Y.S. 2d 62 (Sup. Ct., 1940); 7 White on New York Corporations, par. 12.18, p. 257.

Accordingly, defendants are entitled to a judgment declaring that the certificate of amendment of the certificate of incorporation of Globe filed with the Secretary of State on January 10, 1963, is null and void and a declaration that the directors of Globe are to be elected by a vote of the persons entitled to vote a plurality of Class A common stock of such corporation at the annual meeting of the stockholders pursuant to New York Business Corporation Law §§ 608 and 614.

Settle order.

THOS. F. MURPHY
U. S. D. J.

Dated, New York, N. Y., November 19, 1963.

Opinion of United States Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 450—September Term, 1963.

(Argued April 29, 1964 Decided June 15, 1964.)

Docket No. 28682

GLOBE SLICING MACHINE CO., and LEWIS NOVOTING,

Plaintiffs-Appellants,

—v.—

ROLF K. HASNER,

Defendant-Appellee,

—and—

ASTRID SIVERTSEN,

Defendant.

Before:

LUMBARD, *Chief Judge*
MOORE and SMITH, *Circuit Judges.*

Appeal from summary judgment for defendant in the United States District Court for the Southern District of New York, Thomas F. Murphy, *J.* 221 F. Supp. 291. Affirmed, but remanded for modification of the permanent injunction of the district court.

EDWARD N. COSTIKYAN, New York, N. Y. (Arthur L. Liman, Roger Goldburg, Paul, Weiss, Rifkind, Wharton & Garrison, New York, N. Y., on the brief), *for plaintiffs-appellants.*

RICHARD HAWKINS, New York, N. Y. (Rogers Doering, Simpson Thacher & Bartlett, New York, N. Y., on the brief), *for defendant-appellee.*

LUMBARD, *Chief Judge*:

The question for decision in this diversity case is whether under the laws of New York the by-laws of Globe Slicing Machine Company prohibiting the "sale or disposition" of shares of its capital stock without first giving the corporation or its other stockholders an opportunity to purchase are applicable to transfers consequent on the death of a stockholder and effected pursuant to the stockholder's will.

Judge Murphy, in dismissing plaintiffs-appellants' complaint, held that the by-law in question did not have the effect of restricting a testamentary disposition of the shares of stock owned by Peter M. Sivertsen, one of the founders of Globe and its president from its organization in 1925, inasmuch as the restrictive wording of the by-law did not clearly encompass testamentary dispositions. We affirm this holding.

Globe was organized under the laws of New York in 1925 by a small group of businessmen, including Lewis Novoting and Peter M. Sivertsen. In 1930, Globe raised capital by selling Class A and Class B stock to William Schmitz and George Schaab. Simultaneously with the sale of stock to these outsiders, Globe adopted Article IX which, in pertinent part, provided:

> "No sale or disposition of any shares of the capital stock of this corporation by any stockholder shall be

valid unless and until he shall give notice in writing of such intention to the corporation, and to all the present stockholders of the company (with the exception of Mr. Frederick Singer) whereupon the company and all of said stockholders shall jointly and/or severally have the option and right to purchase the same within thirty days after receiving such notice . . ."

By 1942 Sivertsen and Novoting had become the only holders of Class A stock, and their wives the only holders of Class B stock. On October 28, 1962, Peter M. Sivertsen died. He had executed a will in July 1962, appointing Rolf Hasner as his executor, and bequeathing all of his stock, 54% of Globe's Class A common stock, to his wife Astrid Siversten. The Class A common stock had the exclusive right to elect directors. The appellant, Lewis Novoting, owns the balance of the Class A shares as well as a majority of the Class B shares which confers the right to vote on all other matters.[1] The appellants offered to buy the shares owned by Sivertsen at a formula price set forth in Article IX and when Hasner refused they brought suit in the Southern District of New York to restrain Hasner from "violating the provisions of Article IX."

The plaintiffs claim they have a first option to purchase the decedent's shares of Globe stock. Under New York law first option provisions restricting alienation of stock through testamentary as well as *inter vivos* transfers are valid. *Allen* v. *Baltimore Tissue Corp.*, 2 N. Y. 2d 534 (1957). However, as Justice Coleman stated in *Storer* v. *Ripley*, 12 Misc. 2d 662, 178 N. Y. Supp. 2d 7 (N. Y. Co. 1958), if a restriction on the alienability of stock is to be effective in the case of a transfer consequent on death "that consequence must be clearly expressed."

[1] Novoting holds Class B stock as executor of the estate of his deceased wife, Josephine Novoting.

Upon Sivertsen's death title to his stock was transferred by operation of law to his personal representative, Hasner. "[T]he corporation is bound to register upon its books the transfer of the certificate of stock to the [executor] in [his] representative capacity." *Matter of Starbuck*, 251 N. Y. 439 (1929). The question thus centers on whether the executor can transfer the stock to the decedent's beneficiary, Astrid Sivertsen, notwithstanding the wording of the 1930 by-law. In light of the New York policy to construe first option restraints narrowly, we affirm the district court's holding that Article IX of Globe's by-laws does not apply to testamentary dispositions. *Storer* v. *Ripley, supra; Lane* v. *Albertson*, 78 App. Div. 607, 79 N.Y.S. 947 (2d Dept., 1903). In the *Lane* case the court had before it the articles of a joint stock association which provided that:

> "No member of the association, nor his executors, administrators, or other legal representatives, shall sell or transfer any of the capital stock of the association held by him or them, without first offering same for sale to the association . . ."

The Appellate Division held as a matter of law that the quoted words did not apply either to the transfer of the shares from the decedent to his executor or to the subsequent transfer from the executor to the residuary legatee. The fact that the critical words in the *Lane* case are "sell or transfer" while in the instant case the limitation is upon "sale or disposition" does not alter the application of a narrow construction of the by-law. First option provisions in order effectively to restrain dispositions by will must specifically so provide. This was not done here.

The appellants contend that summary judgment procedures employed by the district court were improper. We disagree. In opposing Hasner's motion for summary

judgment in the district court the appellant raises no claim that there were any additional facts which should have been considered in disposing of the motion. Nor have the appellants called our attention to any relevant testimony which was not considered by the district court.

After the district court declared that the decedent's executor, Hasner, was not required under Article IX to offer for sale Sivertsen's shares to the appellants, Novoting made new efforts to limit the influence of Hasner's shares in Globe's affairs. Within hours after summary judgment was entered Novoting had 50 shares of Class A stock transferred from Globe's treasury to himself in exchange for $40,000 and his promise to pay such additional sums as were fixed later by the Board of Directors as fair value. Clearly the district court was justified in issuing an injunction so as to give effect to its judgment and thereby preserve the voting rights of Hasner. However, the appellants argue that the injunction is defective in that it was both too broad and unaccompanied by findings, and, as such, fell short of the stringent standards for the issuance of injunctions provided by Rule 65(d) of the Federal Rules of Civil Procedure. We agree. The injunction does not stop at prohibiting Novoting from voting shares issued without the authorization of the Board of Directors; it restrains Novoting from "taking any action, including making any application in any other court than this Court, to interfere with the exercise by defendant Hasner of his rights . . ." The scope of the injunction is not limited sufficiently to prevent infringement of the rights that Novoting does have, such as petitioning for dissolution of Globe.

Moreover, Rule 65(d) requires that "Every order granting an injunction and every restraining order shall set forth the reasons for its issuance . . ." Yet neither in its opinion nor judgment has the district court stated the reasons for

the issuance of the injunction. Upon remand the district court should amplify its order to comply with Rule 65(d).

We affirm the judgment of the district court, but remand the case for amplification of the court's order and modification of its injunctive provisions, consistent with this opinion.

Business Corporation Law.

"Section 504:

(c) Shares with par value may be issued for such consideration, not less than the par value thereof, as is fixed from time to time by the board.

(d) Shares without par value may be issued for such consideration as is fixed from time to time by the board unless the certificate of incorporation reserves to the shareholders the right to fix the consideration. . . .

(e) Treasury shares may be disposed of by a corporation on such terms and conditions as are fixed from time to time by the board."

"Section 505. Rights and options to purchase shares; issue of rights and options to directors, officers and employees. (a) Except as otherwise provided in this section or in the certificate of incorporation, a corporation may create and issue, whether or not in connection with the issue and sale of any of its shares or bonds, rights or options entitling the holders thereof to purchase from the corporation shares of any class or series, whether authorized but unissued shares, treasury shares or shares to be purchased or acquired, upon such consideration, terms and conditions as may be fixed by the board."

"Section 803. Authorization of amendment or change.

(a) Amendment of the certificate of incorporation may be authorized by vote of the holders of a majority of all outstanding shares entitled to vote thereon at a meeting of shareholders."

"Section 1102. Directors' petition for judicial dissolution.

If a majority of the board adopts a resolution that finds that the assets of a corporation are not sufficient to discharge its liabilities or that a dissolution will be beneficial to the shareholders, it may present a petition for its dissolution. .L. 1961, c. 855, eff. Sept. 1, 1963."

"Section 1104. Petition in case of deadlock among directors or shareholders.

(1) That the directors are so divided respecting the management of the corporation's affairs that the votes required for action by the board cannot be obtained.

(2) That the shareholders are so divided that the votes required for the election of directors cannot be obtained.

(3) That there is internal dissension and two or more factions of shareholders are so divided that dissolution would be beneficial to the shareholders.

(c) Notwithstanding any provision in the certificate of incorporation any holder of shares entitled to vote at an election of directors of a corporation, may present a petition for its dissolution on the ground that the shareholders are so divided that they have failed, for a period, which includes at least two consecutive annual meeting dates, to elect successors to directors whose terms have expired or would have expired upon the election and qualification of their successors. L. 1961, c. 855; amended L. 1963, c. 748, Section 23, both eff. September 1, 1963."